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No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

-vs-

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Minnesota statute violates the establishment clause of the first amendment to the United States Constitution by providing a state income tax deduction for certain expenses actually incurred by a taxpayer's dependents attending public or private school?

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The respondent Clyde E. Allen, Jr., Minnesota Commissioner of Revenue, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is not reported but is set forth beginning at A-1 of the Petitioners' Appendix.[1] The petitioners accurately set forth the statutory and constitutional provisions involved in the case.

[1] Further references to the Petitioners' Appendix will be "Petition at A-—."

STATEMENT OF THE CASE

The petitioners seek review of a decision by the Court of Appeals for the Eighth Circuit upholding the constitutionality of Minn. Stat. § 290.09, subd. 22 (1980). That statute authorizes state income tax deductions for certain school-related expenditures made by taxpayers on behalf of their dependents. This is not the first time that tax deduction has been challenged on establishment clause grounds. A three-judge federal district court upheld the same statute in *MCLU v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). Indeed, three of the original plaintiffs in this case were dismissed as plaintiffs because they had possessed an interest in *Roemer*.[2]

The challenged statute was originally enacted more than 25 years ago as Minn. Laws 1955, ch. 741. The only amendment to the provision was adopted in 1976. Minn. Laws 1976, ch. 37. Under the statute, a tax deduction is available to all taxpayers who incur the identified school-related expenses on behalf of dependents attending any qualifying public or non-public school in Minnesota or its bordering states. The deductible expenses identified by the statute are sufficiently numerous and varied that virtually every taxpayer-parent in Minnesota might fairly be expected to incur at least some of them. *See* Memorandum and Order, Petition at A-62 - A-66.

The broad availability of the deduction was one reason the district court and the court of appeals concluded that the Minnesota deduction was fundamentally different from the New York tax exemption struck down in *Committee for*

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[2] Throughout this case, the respondent Commissioner of Revenue has maintained that a taxpayer action, such as MCLU v. Roemer, is necessarily a representative action barring later taxpayer actions on the same subject.

Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1975). Unlike the tax scheme considered there, the Minnesota deduction makes significant benefits available to parents of both private- and public-school children. *Nyquist*, 413 U.S. at 782, n.38, Petition at A-41.

The court of appeals distinguished the Minnesota deduction from the New York scheme for another reason. Under Minn. Stat. § 290.09, subd. 22, taxpayers are entitled to a deduction from gross income only to the extent they actually make expenditures and only up to a maximum established by the law. That is to say, the deduction is a "genuine tax deduction" which the Court in *Nyquist* expressly distinguished from the New York exemption. *Nyquist*, 413 U.S. at 790, n.49. That exemption provided benefits bearing no direct relationship to actual expenditures and, in some cases, resulted in direct payments from the state to low income parents who sent their children to private schools. Unlike the New York scheme, the Minnesota deduction was not "designed to yield a prior determined amount of tax forgiveness in exchange for performing a specific act which the state desires to encourage . . . ." *Nyquist*, 413 U.S. at 789. *See* Petition at A-41 - A-50.

The petitioners made several attempts to show that, as a practical matter, the tax deduction impermissibly advances religion. Before the district court, they submitted data which were intended to show that the majority of tax benefits extended under the facially neutral act went to parents of sectarian students. Before the court of appeals, they submitted a slightly revised analysis based upon the same data. The district court found that the statistical argument "lack[ed] credibility." Petition at A-81. The court of appeals reached a similar conclusion. Petition at A-28.

Among the errors and omissions in the petitioners' factual argument, the district court noted with particularity the failure to properly account for more than $2 million of deductible tuition payments made by parents of students in Minnesota public schools. Petition at A-75. In addition, the petitioners completely failed to account for revenue losses which may be attributable to tuition payments to secular schools outside Minnesota and the potentially enormous amounts attributable to payments by thousands of parents for such common items as gym clothes, shop class supplies, and rented band instruments. Petition at A-7 - A-8.

Ultimately, however, the court of appeals did not rest its decision on the accuracy or inaccuracy of the petitioners' data. Even accepting the petitioners' factual presentation, the court found that the deduction provides "substantial benefits" to parents of public school students as well as those of private school students. Petition at A-51 - A-52. It further found that, by way of the deduction, Minnesota merely "abstains from taxing that income which has been de[v]oted by a broad class of Minnesota citizens to their children's education." Petition at A-52. The Court concluded that such a policy is inherently neutral and satisfies the ultimate demand of the establishment clause by neither advancing nor inhibiting religion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Conflict Between The First And Eighth Circuits Rests Upon The Facts Presented To Those Courts.

In its decision, the Eighth Circuit upheld a statute similar to one struck down in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980). The petitioners argue that Supreme Court review is required to resolve the apparent conflict. The conflict, however, rests largely on the factual differences between the two cases and therefore requires no resolution by this Court.

The analysis supplied by both courts focused on the nature of the class of beneficiaries created by the statute before them. Both courts recognized that this Court has undertaken similar analyses in similar circumstances and has upheld those statutes which extend benefits to a broad and internally pluralistic class of beneficiaries. *Norberg*, 630 F.2d at 861, Petition at A-41.[3]

However, the two courts reached strikingly different conclusions about the nature of the classes created by the statutes. The court in *Norberg* found that the majority of taxpayers "eligible" for the deduction were those who sent their children to sectarian schools. *Id.* at 859, 861. While such a conclusion may or may not be correct under the Rhode Island law, it clearly would not be correct under the Minnesota law. As the court in this case correctly found, significant benefits are

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[3] Compare *Board of Education v. Allen*, 392 U.S. 236 (1968) and *Everson v. Board of Education*, 330 U.S. 1 (1947) with *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1975).

available to *all* taxpayers with dependents attending elementary or secondary schools. Petition at A-45 - A-47. Consequently, while the two courts analyzed the statute before them using a similar legal framework, their different findings propelled them to different conclusions.

At the heart of the conflict between the First and Eighth Circuits is a conflict in findings of fact. Such a conflict requires no resolution by this Court. The petition for a writ of certiorari should be denied.

2. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

As framed by the petitioners, the Question Presented is incorrect for two reasons. First, the petitioners suggest that the challenged statute provides tax deductions of specific amounts without regard to the actual expenses incurred by the taxpayer. Second, the petitioners suggest that the benefits of the tax deduction "flow overwhelmingly" to parents of children attending sectarian schools. Petition at i. As has already been indicated, *supra* at 3, the challenged deduction is a true deduction available only to the extent that covered expenses are actually incurred. More importantly, the facts of this case do not support the petitioners' position that the benefits of the deduction flow "overwhelmingly" or even "primarily" to parents of children attending sectarian schools.

Even if tuition were isolated from all other deductible expenses covered by the statute, the petitioners' factual presentations remain inadequate to show that the statute's primary benefit flows to those attending sectarian schools. As discussed above, more than $2 million in tuition payments were made in the relevant year to Minnesota public schools alone.

Further, the challenged statute permits deduction of tuition payments which are not included in that figure and for which the petitioners do not account. Petition at A-45, A-75. The inaccuracy of the issue as stated by the petitioners is even more obvious when deductible expenses other than tuition are considered. *See* Petition at A-62 - A-66. The record indicates that in the relevant year about 815,000 students attended public school and about 87,000 attended private, sectarian schools. Petition at 3-4. The total revenue loss due to non-tuition expenditures by public school students could easily equal and potentially dwarf that due to all types of deductible expenditures by sectarian school students.

The petitioners have also suggested that the Court should undertake review of this case so that it may thwart what the petitioners consider one more of many "ingenious plans" designed to aid sectarian schools in ways not yet expressly rejected by this Court. Petition at 11. The tax provision at issue, however, was first adopted in 1955. It thus predates every significant decision in the area save *Everson v. Board of Education*, 330 U.S. 1 (1947), in which this Court approved an analytically similar plan of aid to a broad class of students. Consequently, it is futile to suggest that the Minnesota deduction was intentionally crafted to evade this Court's rulings.

The challenged deduction is a genuine tax deduction available to virtually every Minnesota taxpayer with dependents attending elementary or secondary school. It is neither intended to nor does it effect the advancement of religion.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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